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Todd F. Silbergeld  
Director-  
Federal Regulatory

SBC Communications Inc.  
1401 I Street, N.W.  
Suite 1100  
Washington, D.C. 20005  
Phone 202 326-8888  
Fax 202 408-4806



EX PARTE OR LATE FILED

July 17, 1997

**NOTICE OF EX PARTE PRESENTATION**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

RECEIVED  
JUL 17 1997  
FEDERAL COMMUNICATIONS COMMISSION  
COMMUNICATIONS SECTION

Re: *In the Matters of Application by SBC Communications Inc.,  
Southwestern Bell Telephone Company, and Southwestern Bell  
Communications Services, Inc. d/b/a Southwestern Bell Long Distance  
for Provision of In-Region, InterLATA Services in Oklahoma, CC Docket  
No. 97-121/and Implementation of the Local Competition Provisions in  
the Telecommunications Act of 1996, CC Docket No. 96-98*

Dear Mr. Caton:

In accordance with the Commission's rules governing ex parte presentations, please be advised that yesterday Dale (Zeke) Robertson, Senior Vice President, Alan F. Ciamporcero, Vice President-Federal Regulatory, and the undersigned, met with Commissioner Rachelle B. Chong and Kathy Franco and Tom Zagorsky of the Commissioner's staff, in connection with the above-referenced dockets.

The purpose of the meeting was to discuss the Commission's decision and underlying reasoning regarding Southwestern Bell's application for interLATA authority in the State of Oklahoma. Pursuant to Commissioner Chong's request, attached are the relevant pages of the Commission's Memorandum Opinion and Order to which we referred in our discussion. The presentation did not include any new data or arguments not already reflected in filings and pleadings in the proceedings.

Should you have any questions concerning the foregoing, do not hesitate to contact me.

Very truly yours,

*Todd F. Silbergeld*

Attachment

cc: The Hon. Rachelle B. Chong  
Ms. Franco  
Mr. Zagorsky

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271(c)(1)(A).<sup>114</sup> SBC also cites a floor statement stating that a BOC may pursue entry under Track B if it has not received "any request for access and interconnection from a facilities-based carrier that meets the criteria in section 271(c)(1)(A)."<sup>115</sup> We decline to attach the weight to these and other citations to the legislative history that SBC assigns because other passages in the legislative history refer to "would-be" or "potential" competitors. These passages indicate that Congress assumed carriers would not yet be operational competitors when they requested the access and interconnection arrangements necessary to enable them to compete.<sup>116</sup> For example, as discussed below,<sup>117</sup> the Conference Committee emphasized the importance of "*potential* competitors" having the benefit of the Commission's rules implementing section 251.<sup>118</sup> In addition, the House Commerce Committee indicated that Track B would not create an "unreasonable burden on a *would-be* competitor" to request access and interconnection under section 271(c)(1)(A).<sup>119</sup> SBC cites no support for its contention that this language "simply reflects a belief that [competing LECs] would be full competitors in the local market only after they implement interconnection agreements under section 251."<sup>120</sup>

41. Contrary to SBC's claim that its reading of section 271 is supported by legislative history, we conclude that the legislative history surrounding section 271(c)(1)(A) establishes that, consistent with its goal of developing competition, Congress intended Track A to be the primary vehicle for BOC entry in section 271. As discussed below, by tying BOC in-region, interLATA entry to the development of local competition in this manner, Congress expected that there would be a "ramp-up" period during which requests from potential competitors would preclude BOCs from applying under Track B while requesting carriers are in the process of becoming operational competitors. We find, therefore, that the statutory scheme established by Congress supports our conclusion that the term "such

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<sup>114</sup> See SBC Brief in Support at 14 (citing 141 Cong. Rec. H8425, H8458 (daily ed. Aug. 4, 1995) (statement of Rep. Tauzin)).

<sup>115</sup> See SBC Apr. 28 Comments at 14 & n.25 (citing 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert)).

<sup>116</sup> See Department of Justice Evaluation at 16; AT&T Reply Comments at 24-25.

<sup>117</sup> See *infra* at para. 43.

<sup>118</sup> See Joint Explanatory Statement at 148-49 (emphasis added).

<sup>119</sup> See H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 77-78 (emphasis added) (House Report).

<sup>120</sup> SBC Reply Comments at 6 n.11.

provider" in section 271(c)(1)(B) refers to a potential competitor that is seeking access and interconnection in order to enter the local exchange market.<sup>121</sup>

42. That Congress intended BOCs to obtain approval to enter their in-region interLATA markets primarily by satisfying the requirements of section 271(c)(1)(A) is evidenced not only by the stated purpose of the 1996 Act which was to "open[ ] all telecommunications markets to competition,"<sup>122</sup> but also by statements in the Report of the House Commerce Committee.<sup>123</sup> These statements are particularly relevant because the text of section 271(c)(1) was adopted almost verbatim from the House bill.<sup>124</sup> The House Committee Report states that the existence of a facilities-based competitor that is providing service to residential and business subscribers "is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition."<sup>125</sup> Moreover, that Report observes that "the Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service somewhere in the State prior to granting a BOC's petition for entry into long distance."<sup>126</sup> Thus, we find that Congress regarded the presence of one or more operational competitors in a BOC's service area as the most reliable evidence that the BOC's local markets are, in fact, open to competitive entry.<sup>127</sup>

43. At the same time, Congress, by intending Track A to be the primary entry vehicle, understood that there would be some delay between the passage of the 1996 Act and actual entry by facilities-based carriers into the local market.<sup>128</sup> For example, it expressly

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<sup>121</sup> See TRA Apr. 28 Comments at 8 (contending that Track B's reference to a "provider" describes a potential facilities-based competitor seeking entry into the local exchange market through network access and interconnection); TRA May 1 comments at 14-15; WorldCom Apr. 28 Comments at 8-9.

<sup>122</sup> Joint Explanatory Statement at 1.

<sup>123</sup> See, e.g., ALTS Motion at 6-7; CompTel Apr. 28 Comments at 3-4; NCTA May 1 Comments at 7 n. 12; Sprint Apr. 28 Comments at 5.

<sup>124</sup> The Conference Committee expressly adopted the language contained in section 271(c)(1) from the House bill. See Joint Explanatory Statement at 147 (stating that the "test that the conference agreement adopts comes virtually verbatim from the House amendment").

<sup>125</sup> House Report at 76-77.

<sup>126</sup> *Id.* at 77.

<sup>127</sup> See CompTel Apr. 28 Comments at 3.

<sup>128</sup> See Department of Justice Evaluation at 10; Sprint Apr. 28 Comments at 9; Time Warner May 1 Comments at 10-11. Congress' expectation that section 271 relief may take some time is also evidenced by section 271(e)(1) which states that the joint marketing restriction applicable to larger interexchange carriers would expire once a BOC "is authorized . . . to provide interLATA services in an in-region State, or [once] 36

recognized that it would take time for competitors to construct or upgrade networks and then to extend service offerings to residential and business subscribers.<sup>129</sup> As the Joint Explanatory Statement observes, "it is unlikely that competitors will have a fully redundant network in place when they initially offer service, because the investment necessary is so significant."<sup>130</sup> Rather, as many commenters recognize, because potential competitors must accomplish a number of things before they may begin to provide telephone exchange service, such as obtaining a certificate of convenience and necessity from the state commission, negotiating (and arbitrating, if necessary) an interconnection agreement with the BOC, obtaining state approval of that agreement, filing and obtaining approval of a tariff for local exchange service, and implementing their interconnection agreement, it will inevitably take some time before these carriers can actually begin to provide telephone exchange service.<sup>131</sup> Congress' recognition that this transformation to operational status would not be an instantaneous one is evidenced by the Joint Explanatory Statement's observation that, "it is important that the Commission rules to implement new section 251 be promulgated within 6 months after the date of enactment so that *potential* competitors will have the benefit of being informed of the Commission rules in requesting access and interconnection before the statutory window in new section 271(c)(1)(B) shuts."<sup>132</sup>

44. That Congress expected there to be a "ramp-up" period for requesting carriers to become operational competitors is further evidenced by section 251 itself. In adopting section 251, Congress acknowledged that the development of competition in local exchange markets is dependent, to a large extent, on the opening of the BOCs' networks.<sup>133</sup> Under section 251, incumbent LECs, including BOCs, are required to take certain steps to open their networks including "providing interconnection, offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold."<sup>134</sup> Our rules implementing section 251 envisioned that incumbent LECs would need some time to complete these necessary steps. For example, in the *Local Competition Order*,

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months have passed since the date of enactment of the Telecommunications Act of 1996, *whichever is earlier*." See 47 U.S.C. § 271(e)(1) (emphasis added); Sprint Apr. 28 Comments at 10-11 n. 9.

<sup>129</sup> See Sprint Apr. 28 Comments at 9-10.

<sup>130</sup> Joint Explanatory Statement at 148.

<sup>131</sup> Department of Justice Evaluation at 13; CPI Apr. 28 Comments at 8; MCI Reply Comments at 4-5; WorldCom Apr. 28 Comments at 11.

<sup>132</sup> Joint Explanatory Statement at 148-49 (emphasis added).

<sup>133</sup> As the Department of Justice observes, a "fundamental premise of the 1996 Act is that the development of local exchange competition will require opening up the possibilities for access and interconnection to the BOC's local network." Department of Justice Evaluation at 10.

<sup>134</sup> *Local Competition Order*, 11 FCC Rcd at 15506.

we stated that incumbent LECs must have made modifications to their operational support systems (OSS) necessary to provide access to OSS functions by January 1, 1997.<sup>135</sup> Moreover, in the *Second Order on Reconsideration*, we declared that we would not take enforcement action against incumbent LECs "making good faith efforts to provide . . . access [to OSS functions]."<sup>136</sup> In reaching these conclusions, we recognized that some incumbent LECs would require some time before they would be able to provide potential competitors access to their OSS.

45. Moreover, we find that the very language of section 271(c)(1)(B) confirms that Congress envisioned the existence of a "ramp-up" period.<sup>137</sup> The exceptions in section 271(c)(1)(B) are indicative of Congress' recognition that there would be a period during which good-faith negotiations are taking place, interconnection agreements are being reached, and the potential competitors are becoming operational by implementing their agreements.<sup>138</sup> By delineating the circumstances under which Track B becomes available to the BOC, Congress must have understood that there would often be some time when Track B is unavailable, but the BOC has not yet satisfied the requirements of section 271(c)(1)(A).<sup>139</sup> This would not be the case, however, under SBC's theory that only a request for access and interconnection from an operational facilities-based provider will foreclose Track B.

46. Further, as a matter of policy, we find that our interpretation of "such provider" is consistent with the incentives established by Congress in section 271. In order to gain entry under Track A, a BOC must demonstrate that it has "fully implemented" the competitive checklist in section 271(c)(2)(B).<sup>140</sup> Thus, by expecting Track A to be the primary means of BOC entry, Congress created an incentive for BOCs to cooperate with potential competitors in the provision of access and interconnection and thereby facilitate competition in local exchange markets. In contrast, Track B, which requires only that a BOC "offer[ ]" the items

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<sup>135</sup> *Id.* at 15767-68.

<sup>136</sup> *Local Competition Order, Second Order on Reconsideration*, CC Docket No. 96-98, FCC 96-476 at para. 11 (rel. Dec. 13, 1996).

<sup>137</sup> Dobson Apr. 28 Comments at 3 (asserting that the language of section 271(c)(1)(B) confirms that Congress envisioned the existence of a hiatus during which pending requests would preclude BOCs from applying under Track B even though the requesting carriers are not yet operational); WorldCom Apr. 28 Comments at 11-12.

<sup>138</sup> See 47 U.S.C. § 271(c)(1)(B). See also Brooks Apr. 28 Comments at 5-6; Dobson Apr. 28 Comments at 3; WorldCom Apr. 28 Comments at 11-12.

<sup>139</sup> See Cox May 1 Comments at 7 n. 9 (stating that the exceptions in section 271(c)(1)(B) demonstrate that Congress understood there would be a lag between requesting interconnection and providing service, and that it did not intend for normal delays to permit BOCs to jump to Track B).

<sup>140</sup> 47 U.S.C. § 271(d)(3)(A)(i).

included in the competitive checklist, does not contemplate the existence of competitive local entry and, therefore, does not create such an incentive for cooperation.<sup>141</sup> Rather, as discussed more fully below, Congress intended Track B to serve as a limited exception to the Track A requirement of operational competition so that BOCs would not be unfairly penalized in the event that potential competitors do not come forward to request access and interconnection, or attempt to "game" the negotiation or implementation process in an effort to deny the BOCs in-region interLATA entry.<sup>142</sup>

47. In addition, if we were to find that only a request from an operational competing facilities-based provider of residential and business service forecloses Track B, this would guarantee that, after ten months, the BOC either satisfies the requirements of section 271(c)(1)(A) or is eligible for Track B.<sup>143</sup> As the Department of Justice asserts, "[s]uch an interpretation of [s]ection 271 would radically alter Congress' scheme, [by] expanding Track B far beyond its purpose and, for all practical purposes, reading the carefully crafted requirement of Track A out of the statute."<sup>144</sup> For example, under SBC's theory, either a BOC has received a "qualifying request" from a carrier that already satisfies the requirements of section 271(c)(1)(A), or the BOC may proceed under Track B.<sup>145</sup> SBC advocates an interpretation of the statute where the circumstances under which a competing provider may make a "qualifying request" would be so rare that, after December 8, 1996, Track B would be available in any state that lacks a competing provider of the type of telephone exchange service to residential and business subscribers described in section 271(c)(1)(A).<sup>146</sup> As WorldCom maintains, this would lead to the illogical result that BOCs that successfully delay

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<sup>141</sup> *Id.* § 271(d)(3)(A)(ii).

<sup>142</sup> See *infra* at para. 55. See also CompTel Apr. 28 Comments at 3; Department of Justice Evaluation at 11; Sprint Apr. 28 Comments at 10-11; TRA Apr. 28 Comments at 4-5.

<sup>143</sup> Or, as SBC alleges in the instant case, a BOC would be eligible to proceed under both Track A and Track B if the qualifying request was made within the three months prior to the filing of the BOC's section 271 application. We recognize, of course, that in order to be eligible for Track B a BOC must also have a statement of generally available terms and conditions that has been approved or permitted to take effect by the applicable state commission. See 47 U.S.C. § 271(c)(1)(B).

<sup>144</sup> Department of Justice Evaluation at 13.

<sup>145</sup> See MCI Apr. 28 Comments at 3 (claiming that, under SBC's interpretation, Track B would only apply when no facilities-based provider that already has an access and interconnection agreement requests such an agreement); NCTA May 1 Comments at 7 (stating that SBC construes the statute so that after ten months Track B would virtually always apply unless a competitor who already qualifies as a facilities-based competitor to residential and business subscribers requests access three months before the BOC files).

<sup>146</sup> See Cox Reply Comments at 16 (asserting that, if the BOCs really believed Track B became available if no operational competing provider requested access and interconnection prior to September 8, 1996, they would have filed their statements of generally available terms by the middle of 1996 and applied for in-region, interLATA entry on December 8, 1996).

or prevent entry into their local markets by new entrants that have requested access and interconnection under section 251 would be rewarded by being granted the right to pursue in-region interLATA entry through Track B.<sup>147</sup> As a consequence, BOC in-region interLATA entry would, in most states, precede the introduction of local competition.<sup>148</sup> We find it unlikely that Congress intended to eviscerate Track A in this manner. As the Department of Justice contends, there is "no basis for the assumption that Congress intended Track A, the only track included in the bill as originally passed by the Senate, to play such an insignificant role."<sup>149</sup>

48. In addition to its notion of a "post-dated" request, SBC sets forth two other hypothetical scenarios in which the BOC could receive a "qualifying request" from an already operational carrier that forecloses Track B.<sup>150</sup> Although SBC does not argue that either of these hypothetical situations is present here, we briefly describe them to illustrate their limited application. Under one scenario, SBC argues that it could receive a request for access and interconnection from a competing LEC that is already providing facilities-based telephone exchange service to residential and business customers completely over its own network. Alternatively, SBC maintains it could receive a request for access and interconnection from a competing LEC that had negotiated an interconnection agreement prior to the 1996 Act.<sup>151</sup>

49. As an initial matter, we note that SBC appears to set forth a reading of the word "request" in these hypothetical scenarios that is different from the one it uses in characterizing Brooks' request for access and interconnection in the instant application. SBC appears to assert that, for the purposes of the hypothetical scenarios, whether a request for access and interconnection constitutes a qualifying request is determined at the time the request is made. For the purposes of the case at hand, however, SBC claims that Brooks' request for access and interconnection was not qualifying at the time it was made, but subsequently became a qualifying request when Brooks became operational. SBC fails to explain how the meaning of the statutory term "request" can vary according to the operational status of the requestor.

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<sup>147</sup> WorldCom Apr. 28 Comments at 13-14; WorldCom May 1 Comments at 20-21; Department of Justice Evaluation at 13 (stating that, if SBC's interpretation of Track B were correct, Track B would no longer be a limited exception applicable where a BOC would otherwise be foreclosed indefinitely from entry into in-region interLATA markets). *See also* AT&T May 1 Comments at 18; NCTA May 1 Comments at 7 (stating that SBC's interpretation of section 271(c)(1)(B) nullifies Track A agreements as a means of stimulating local competition).

<sup>148</sup> WorldCom Reply Comments at 7; TRA Reply Comments at 11-12.

<sup>149</sup> Department of Justice Evaluation at 14. *See also* MCI Reply Comments at 4.

<sup>150</sup> SBC Apr. 28 Comments at 16-17. *See also* BellSouth Apr. 28 Comments at 4-5.

<sup>151</sup> SBC Apr. 28 Comments at 16-17 (citing 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Breaux)); BellSouth Apr. 28 Comments at 4-5.

50. In addition, we agree with the Department of Justice that it is implausible that Congress would have adopted Track A solely to deal with situations of such narrowly limited significance as SBC poses in its hypotheticals.<sup>152</sup> SBC's first scenario assumes the presence of a carrier, prior to the 1996 Act, with a completely duplicative, ubiquitous network that provided telephone exchange service to residential and business subscribers in competition with a BOC, but did not yet have an access and interconnection agreement with the BOC.<sup>153</sup> We know of no such carrier.<sup>154</sup> Indeed, the legislative history of the Act reflects Congress' recognition that the existence of such facilities-based competition in local markets in February 1996 was improbable.<sup>155</sup> Similarly, the second scenario assumes the presence of either a facilities-based competing LEC that provided telephone exchange service to both residential and business subscribers under a pre-1996 Act interconnection agreement or a facilities-based competing LEC with a pre-1996 Act interconnection agreement that would be capable of providing such service within the statutory window in section 271(c)(1)(B). If there were such interconnection agreements in place between a BOC and a competing LEC operating within a BOC's service area, we do not know of them.<sup>156</sup>

51. Notably, SBC's primary support for the second scenario is the Joint Explanatory Statement's reference to an interconnection agreement between New York Telephone and Cablevision in Long Island, NY.<sup>157</sup> We disagree with SBC that this reference demonstrates that "Congress was aware that, in various markets throughout the country, cable companies and competitive access providers had negotiated interconnection agreements with

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<sup>152</sup> Department of Justice Evaluation at 14.

<sup>153</sup> See Oklahoma AG Apr. 28 Comments at 7. As noted above, such a carrier would presumably require interconnection with the BOC if its customers completed calls to, or received originating calls from, BOC customers. See *supra* at para. 33.

<sup>154</sup> Significantly, the Department of Justice asserts that it "is not aware of any provider other than the [incumbent LECs] that had a significant facilities-based telephone local exchange network of its own in the United States, sufficiently ubiquitous to dispense with interconnection with the BOCs, before the 1996 Act was passed." Department of Justice Evaluation at 15 n. 20. See also AT&T Reply Comments at 23. We note that neither SBC nor any other commenter has provided any examples of such carriers.

<sup>155</sup> See Joint Explanatory Statement at 148 ("it is unlikely that competitors will have a fully redundant network in place when they initially offer local service . . .").

<sup>156</sup> Although in an *ex parte* statement, SBC cites examples of "facilities-based cable-telephone services being provided or tested during consideration of the [1996 Act]," it is unclear from SBC's representation whether these potential competitors were providing, or planning to provide, telephone exchange service in a BOC's service area pursuant to a pre 1996-Act interconnection agreement or, alternatively, whether the new entrants still had to negotiate and execute such agreements. See Letter from Dale Robertson, Senior Vice President, SBC, to William F. Caton, Acting Secretary, FCC at 2 (June 24, 1996) (SBC June 24 *Ex Parte*).

<sup>157</sup> See *id.*

incumbent LECs prior to the 1996 Act."<sup>158</sup> As the Department of Justice observes, a single reference to only one pre-1996 Act interconnection agreement between an incumbent LEC and a facilities-based provider does not establish that Congress expected such situations to be common.<sup>159</sup> Indeed, it is not obvious from this reference in the legislative history whether Cablevision either actually-provided telephone exchange service to both residential and business subscribers on the date of enactment or intended to do so in the future.<sup>160</sup> Based on its experience with the implementation of the 1996 Act nationwide, the Department of Justice notes that only a small minority of states had any local exchange competition before the 1996 Act was passed, and very few providers had become operational.<sup>161</sup> Moreover, the very passage of the 1996 Act -- which was designed to remove impediments to local entry -- indicates that Congress believed that the degree of local telephone competition and interconnection prior to the passage of the 1996 Act was unsatisfactory.

52. Even if there were such facilities-based carriers with pre-1996 Act interconnection agreements, we find that SBC's interpretation would greatly undermine the very incentives that Congress sought to establish in section 271. As mentioned above, section 271 and, in particular, Track A, was established to provide an incentive for BOCs to cooperate in the development of local competition. Under SBC's interpretation of the statute, the BOCs' only incentive would be to cooperate with operational carriers that are already receiving access and interconnection. We find that the incentive to cooperate established by Track A is not limited to only those carriers that are already operational, but instead was designed to ensure that BOCs facilitate the entry of a larger and more significant class of carriers -- *potential* competitors requesting access and interconnection. It would be anomalous for Congress to have adopted Track A solely to provide an incentive to BOCs to cooperate with already competing providers, which do not require the BOCs' cooperation in order to become operational.

53. We note that, if such a competing LEC was not already providing the type of telephone exchange service described in section 271(c)(1)(A) at the time of passage of the

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<sup>158</sup> SBC Apr. 28 Comments at 16.

<sup>159</sup> Department of Justice Evaluation at 15 n.19. *See also* WorldCom Reply Comments at 6-7.

<sup>160</sup> *But see* SBC June 24 *Ex Parte*, Attachment at 1-2 (asserting that by December 1995 "Cablevision had 175 business customers and was preparing to offer residential service on a commercial basis").

<sup>161</sup> Department of Justice Evaluation at 15 n.19. According to the Commission's Common Carrier Competition Report, as of March 21, 1996, competing LECs were operational in only five states. "New competitors [were] small and [were] still experimenting in the market." Common Carrier Competition, CC Report No. 96-9, FCC, Common Carrier Bureau, Spring 1996 at 3-4 (Common Carrier Competition Report). *See also* TRA Reply Comments at 10-11. SBC itself points to only ten potential competitors in five states, one of which is Cablevision, that were planning, testing, or providing telephony services on a limited scale prior to the passage of the 1996 Act. Of these potential competitors, it appears that most of them were merely in the planning or testing stage when the 1996 Act was passed. *See* SBC June 24 *Ex Parte*, Attachment at 1-2.

1996 Act and if it chose to obtain a new agreement pursuant to section 252, it would have to engage in negotiations with the BOC, reach an interconnection agreement, obtain state approval of this interconnection agreement under section 252(e)(4),<sup>162</sup> and then begin providing the type of telephone exchange service to residential and business subscribers described in section 271(c)(1)(A) before its request for access and interconnection could be considered qualifying under SBC's interpretation of section 271(c)(1)(B). As the Department of Justice recognizes, in order for the BOC to be precluded from filing under Track B, the competing LEC would have to complete all of this in the first seven months after the date of enactment.<sup>163</sup> Not only is this unlikely, but this scenario assumes that the BOC would be inclined to cooperate with the competing LEC, reach a negotiated agreement quickly, and proceed under the more rigorous Track A standard, rather than attempt to delay the advent of competition by forcing competing LECs to resort to arbitration until Track B becomes available. Under SBC's interpretation, given the nine-month arbitration deadlines established in section 252(b)(4)(C), a BOC could virtually guarantee its eligibility under Track B by placing all carrier negotiations in arbitration.<sup>164</sup> It seems, therefore, that few, if any, potential competitors would be in a position, under this interpretation, to make a "qualifying request" for access and interconnection before a BOC would become eligible to pursue Track B.<sup>165</sup>

54. Although we reject SBC's interpretation of "qualifying request," we also reject the interpretation of those parties who argue that *any* request from a potential competitor forecloses Track B. As the Department of Justice observes, the term "such provider" in section 271(c)(1)(B) should be interpreted with reference to the type of facilities-based competition that would satisfy the requirements of section 271(c)(1)(A).<sup>166</sup> Accordingly, we conclude that the request from a potential competitor must be one that, *if implemented*, will satisfy section 271(c)(1)(A).<sup>167</sup> That is, we find that a "qualifying request" must be one for access and interconnection to provide the type of telephone exchange service to residential

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<sup>162</sup> Under this section, the state commission has up to 90 days to approve or reject an interconnection agreement. See 47 U.S.C. § 252(e)(4).

<sup>163</sup> See Department of Justice Evaluation at 14. Pursuant to section 271(c)(1)(B), in order for a BOC to file an application under Track B as soon as it became available, on December 8, 1996, it must not have received a qualifying request prior to September 8, 1996.

<sup>164</sup> 47 U.S.C. § 252(b)(4)(C). See Sprint Apr. 28 Comments at 11-12 n.10. See also Cox Reply Comments at 15-16. We also note that, after the parties reach an arbitrated agreement, it must be submitted to the applicable state commission for approval. Under section 252(e)(4), the state commission has 30 days in which to approve or deny it. 47 U.S.C. § 252(e)(4).

<sup>165</sup> See Department of Justice Evaluation at 14.

<sup>166</sup> *Id.* at 12.

<sup>167</sup> See LCI Apr. 28 Comments at 6 (stating that SBC's agreement with Brooks "was of the type that once implemented, would provide [SBC] with the basis for seeking approval under Track A.").

and business subscribers described in section 271(c)(1)(A). To find otherwise would not only be contrary to the explicit terms of section 271(c)(1)(B), which states that only a request for "the access and interconnection described in [section 271(c)(1)(A)]" can foreclose Track B,<sup>168</sup> but would lead to anomalous results. For example, allowing *any* type of request for negotiation to foreclose Track B could lead to a situation where a BOC is foreclosed from pursuing Track B because there has been a request for negotiation, even though such a request, when implemented, may not satisfy the requirements of section 271(c)(1)(A). As Ameritech observes, under this interpretation, if a BOC receives a request for access and interconnection from a would-be facilities-based provider of telephone exchange service to business, but not residential, subscribers, Track B would be foreclosed, but the BOC would not be able to satisfy section 271(c)(1)(A) because it would not be able to show that residential subscribers are served by a competing provider. Such a result may place a BOC indefinitely in a "no-man's land" where, in effect, neither Track A nor Track B is available to it.<sup>169</sup>

55. According to its legislative history, Track B was adopted by Congress to deal with the possibility that a BOC, through no fault of its own, could find that it is unable to satisfy Track A.<sup>170</sup> The Joint Explanatory Statement explains that section 271(c)(1)(B) is "intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market."<sup>171</sup> Similarly, the House Committee Report elaborates that, to "the extent that a BOC does not receive a request from a competitor that comports with the criteria [described in section 271(c)(1)(A)], it [should] not [be] penalized in terms of its ability to obtain long distance relief."<sup>172</sup> In this manner, Track B appropriately safeguards the BOCs' interests where there is no prospect of local exchange competition that will satisfy the requirements of section 271(c)(1)(A) or in the event competitors purposefully delay entry in the local market in an attempt to prevent a BOC from gaining in-region, interLATA entry.<sup>173</sup> As the Department of Justice observes, however, "Track B does not represent congressional abandonment of the fundamental principle, carefully set forth in Track A, that a BOC may not begin providing in-region interLATA

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<sup>168</sup> 47 U.S.C. § 271(c)(1)(B).

<sup>169</sup> See also Department of Justice Evaluation at 11. This assumes, of course, that the BOC is not able to show that the requesting provider failed to negotiate in good faith or violated the terms of the interconnection agreement by failing to comply, within a reasonable period of time, with its implementation schedule. See 47 U.S.C. § 271(c)(1)(B).

<sup>170</sup> Department of Justice Evaluation at 12.

<sup>171</sup> Joint Explanatory Statement at 148.

<sup>172</sup> House Report at 77.

<sup>173</sup> Department of Justice Evaluation at 17.

services before there are facilities-based competitors in the local exchange market," provided these competitors are moving toward that goal in a timely fashion.<sup>174</sup>

56. Thus, while SBC's interpretation would ensure that after ten months a BOC either satisfies the requirements of section 271(c)(1)(A) or is eligible to proceed under Track B, the interpretation of the potential competitors could create a situation where the BOC may not be able to pursue either statutory avenue for interLATA relief. In essence, while SBC's interpretation effectively nullifies Track A, the potential competitors' interpretation effectively nullifies Track B. We are keenly aware that adopting the interpretation urged by the potential competitors would necessarily foreclose Track B entry in any state in which a potential competitor has made a request for access and interconnection, regardless whether it is a request that will ever lead to the type of telephone exchange service described in section 271(c)(1)(A).<sup>175</sup> We find that permitting *any* request to foreclose Track B would give potential competitors an incentive to "game" the section 271 process by purposefully requesting interconnection that does not meet the requirements of section 271(c)(1)(A), but prevents the BOCs from using Track B.<sup>176</sup> Such a result would effectively give competing LECs the power to deny BOC entry into the long distance market. This is surely not the result that Congress intended in adopting Track B.

57. We recognize, as several parties point out, that the standard we are adopting will require the Commission, in some cases, to engage in a difficult predictive judgment to determine whether a potential competitor's request will lead to the type of telephone exchange service described in section 271(c)(1)(A).<sup>177</sup> As discussed above, however, we find that this type of judgment is required by the terms of section 271 and is consistent with the statutory scheme envisioned by Congress. The standard we adopt in this Order is designed to take into account both the BOCs' incentive to delay fulfillment of requests for access and interconnection and the incentive of potential local exchange competitors to delay the BOCs' entry into in-region interLATA services. Upon receipt of a "qualifying request," as we interpret it, the BOC will have an incentive to ensure that the potential competitor's request is

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<sup>174</sup> *Id.* at 17-18.

<sup>175</sup> We note that Track B would become available if either of the two exceptions in section 271(c)(1)(B) were applicable. *See also* BellSouth Apr. 28 Comments at 5 (maintaining that adoption of ALTS's "misreading" of section 271(c)(1) would nullify Track B entry).

<sup>176</sup> Ameritech Apr. 28 Comments at 5 n. 3; Bell Atlantic Apr. 28 Comments at 8 (stating that the approach advocated by ALTS would place BOCs at the mercy of their competitors); NYNEX Apr. 28 Comments at 6; U S West Apr. 28 Comments at 5-6.

<sup>177</sup> CPI Reply Comments at 3; *see also* Bell Atlantic Apr. 28 Comments at 7; BellSouth Apr. 28 Comments at 4; SBC Reply Comments at 6 & Appendix A at 14 n.6.

quickly fulfilled so that the BOC may pursue entry under Track A.<sup>178</sup> As long as the qualifying request remains unsatisfied, the requirements of section 271(c)(1)(A) would remain unsatisfied, and Track B would remain foreclosed to the BOC.

58. Further, our standard will not allow potential competitors to delay indefinitely BOC entry by failing to provide the type of telephone exchange service described in Track A. Indeed, in some circumstances, there may be a basis for revisiting our decision that Track B is foreclosed in a particular state. For example, if following such a determination a BOC refiles its section 271 application, we may reevaluate whether it is entitled to proceed under Track B in the event relevant facts demonstrate that none of its potential competitors is taking reasonable steps toward implementing its request in a fashion that will satisfy section 271(c)(1)(A). In addition, as discussed above, the exceptions in section 271(c)(1)(B) provide that a BOC will not be deemed to have received a qualifying request if the applicable state commission certifies that the requesting carrier has failed to negotiate in good faith or failed to abide by its implementation schedule. In this manner, these exceptions also provide BOCs a means of protecting themselves against any feared "gamesmanship" on the part of potential competitors, such as the submission of sham requests intended solely to preclude BOC entry. We therefore disagree with Bell Atlantic that our standard will leave the BOCs "hostage to the claims of competitors."<sup>179</sup> Moreover, for the reasons set forth above, we disagree with CPI that concerns about gamesmanship are misplaced.<sup>180</sup> Finally, we note that the Commission is called upon in many contexts to make difficult determinations and has the statutory mandate to do so.<sup>181</sup> The fact that a determination, such as the one we must make

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<sup>178</sup> Thus, as the Department of Justice observes, properly construed, "the statute serves Congress' procompetitive purposes by affording the BOC a strong incentive to cooperate as would-be facilities-based competitors attempt to negotiate agreements and become operational." Department of Justice Evaluation at 17.

<sup>179</sup> See Bell Atlantic Reply Comments at 4.

<sup>180</sup> See *supra* at para. 56; CPI Reply Comments at 4-5 (asserting that the assumption that competitors would game the regulatory process in order to prevent BOC entry into long distance does not make economic or marketplace sense).

<sup>181</sup> See 47 U.S.C. § 154(i). In different contexts, the United States Supreme Court has recognized that the Commission must necessarily make difficult predictive judgments in order to implement certain provisions of the Communications Act. See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-96 (1981) (recognizing that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations) (citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-814 (1978)); *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982) ("greater discretion is given administrative bodies when their decisions are based upon judgmental or predictive conclusions"). See also *Pub. Util. Comm'n of State of Cal. v. F.E.R.C.*, 24 F.3d 275, 281 (D.C. Cir. 1994) (acknowledging that predictions regarding the actions of regulated entities are the type of judgments that courts routinely leave to administrative agencies). Indeed, we note that determining whether a BOC's section 271 application meets the requirements of the competitive checklist, the requirements of section 272, and is consistent with the public interest, convenience and necessity will require the Commission to engage in highly complex, fact-intensive analyses. See 47 U.S.C. § 271(d)(3).

here, may be complex does not mean the Commission may avoid its statutory duty to undertake it.

59. We also reject NYNEX's argument that Track B is available in any situation where one or more facilities-based providers, as described in section 271(c)(1)(A), have not requested interconnection agreements that include all fourteen items of the competitive checklist.<sup>182</sup> By its terms, Track B is only available in the event the BOC fails to receive a qualifying request for the access and interconnection "described in [section 271(c)(1)(A)]." As discussed above, we have determined that a qualifying request is a request from a potential competitor that, if implemented, will satisfy the requirements of section 271(c)(1)(A). Pursuant to section 271(c)(1)(B), a BOC shall not be considered to have received a qualifying request if the requesting carrier fails to negotiate in good faith or does not abide by the implementation schedule contained in its agreement.<sup>183</sup> We find that section 271(c)(1) and the competitive checklist in section 271(c)(2)(B) establish independent requirements that must be satisfied by a BOC applicant. Thus, the fact that a BOC has received a request for access and interconnection that, if implemented, will satisfy section 271(c)(1)(A), does not mean that the interconnection agreement, when implemented, will necessarily satisfy the competitive checklist. Similarly, we find nothing in the terms of section 271(c)(1)(A) or section 271(c)(1)(B) that suggest that a qualifying request for access and interconnection must be one that contains all fourteen items in the checklist. In rejecting NYNEX's contention, we do not reach the question of whether a potential competitor's interconnection agreement must contain all fourteen items of the competitive checklist in order for a BOC to demonstrate its compliance with the competitive checklist in section 271(c)(2)(B).

### 3. Existence of Qualifying Requests in Oklahoma

60. Consistent with the requirements set forth by Congress, SBC's ability to proceed under Track B is not foreclosed unless there has been a timely request for access and interconnection from a potential provider of the type of telephone exchange service described in section 271(c)(1)(A). We note that the determination of whether the BOC has received such a qualifying request will be a highly fact-specific one. At the same time, however, Congress required the Commission to make determinations on a BOC's section 271 application within 90 days. Given the expedited time in which the Commission must review these applications, it is the responsibility of the BOC to submit to the Commission a full and complete record upon which to make determinations on its application.<sup>184</sup> In this regard, we

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<sup>182</sup> NYNEX Apr. 28 Comments at 1-2. The competitive checklist is contained in 47 U.S.C. § 271(c)(2)(B).

<sup>183</sup> See 47 U.S.C. § 271(c)(1)(B).

<sup>184</sup> BOCs are required under our rules to maintain "the continuing accuracy and completeness of information" furnished to the Commission. See *Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC